No. 48818-3-II

CORY NEWINGHAM, Plaintiff/Respondent

vs.

JOHN NEWINGHAM AND KRISTIE NEWINGHAM, husband and wife,
and VELOCITY CNC MACHINING, INC., Defendant/Appellant.

RESPONDENT'S BRIEF

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1. The trial court did not err when it determined that Velocity CNC Machining, Inc., complied with RCW 4.28.080(9) when it left the summons and complaint at the address of Velocity's registered agent because that address was also the registered agent's home. In the alternative, the trial court did not err when it determined that Velocity CNC Machining was properly served when process was left at the home of Velocity's president and vice-president.

2. The trial court did not err when it concluded that appellants did not establish the tort of defamation where there was substantial evidence in the record to support the trial court's finding that Cory's alleged defamatory statements were true and where truth is a defense to a defamation claim.

3. The trial court did not err when in concluded that appellants did not establish the tort of intentional infliction of emotional distress where the tort requires proof of outrageous conduct and the factual findings do not support a determination that the mistreatment of appellants rose to the level of outrage.

4. The trial court correctly concluded that the contract between the parties was not coerced. The contract between the parties was unilateral; and, as such, once one of the parties fully performed, the other party was obligated to fully perform. Cory fully performed his obligations under the contract when he obtained new clients for Velocity; thus, Velocity was required to make all payments provided for by the terms of the unilateral contract. Any alleged coercion occurring after Cory had fully performed is irrelevant.

5. Respondent is entitled to attorney fees and costs incurred in responding to appellants' appeal under RAP 18.1; RCW 4.84.290; RCW 4.84.250; RCW 4.84.185; *Schmalenberg v. Tacoma News*, 87 Wash. App. 579, 589 n.23, 943 P.2d 350, 356 (1997); and, *Kloepfel v. Bokor*, 149 Wash. 2d 192, 195-96, 66 P.3d 630, 632 (2003).

V. STATEMENT OF THE CASE

This appeal is from the Pierce County Superior Court judgment entered in Cory Newingham's breach of contract claim against Velocity CNC Machining, Inc. [hereinafter "Velocity"]. Under the terms of an oral Sales Representation Agreement, Velocity agreed to pay Cory a 10% commission on all future invoices for each new customer that Cory procured for John's fledgling commercial machine shop. Commissions were to be paid *ad infinitum*. The parties performed the contract according to its terms for about a year and a half; but, once Velocity's business stabilized, Velocity breached the contract when John terminated Cory's commissions. Defendants John and Kristie counterclaimed alleging that Cory had committed the torts of defamation, libel, slander, outrage, and intentional interference with business expectancy.

STATEMENT OF FACTS

John incorporated Velocity in August of 2012 and moved the shop to Sumner, Washington, in October of 2012. At the time of the move, John had only one customer, P&J Machining, Inc. VRP Vol I, pg. 31, lines 6-7 & pg. 55, lines 5-6.

In order to build up Velocity's business, John offered to pay his brother Cory a 10% commission on all machining services that Velocity provided to any customer that Cory brought into the shop for so long as Cory's customer did business with Velocity. RP Vol I, pg. 31, lines 7-11. John agreed to put the contract in writing. Vol. I, pg. 51, lines 7-17.

Cory accepted the offer and immediately began to research local industries that may require machining services. He also began sending introductory emails to prospective clients. RP Vol. I, pg. 33, lines 7-11. John, however, kept making excuses for failing put the contract in writing, such as: "we are too busy to worry about putting the contract in writing right now; what's the big deal, we are brothers, why don't you trust me; if I didn't want to pay you I would just stop doing business with your customers; and, don't worry about it, I will get it done." Vol. I, pg. 53, lines 16-20 & pg. 37, lines 1-4.

When he accepted John's offer in November of 2012, Cory was working full time for Staffmark as an onsite manager. Vol I, pg. 38, lines 5-7. Even though he had a full-time job, Cory immediately began to seek out new customers for Velocity. Vol I, pg. 38, lines 12-18.

Between April 2013 and September 2014 Cory brought in the following new customers: Aerofab, Associated Machining, Capital Industries, Belshaw Adamatic, Dylan Aerospace, INW, Kvichak Marine Industries, Luke Manufacturing, Metal Tech, Machinist, Inc., Seattle Safety, Shareway Industries, Sterlitech Corp, Streich Brothers, Thermaline, Baker Manufacturing, and Tect Aerospace. Plaintiff's Exhibit 2.

Velocity continued to pay commissions per the terms of the agreement until mid September of 2014. Plaintiffs' Exhibit 7. On or about September 19, 2014, about a week after learning that one of their major clients had decided to give all of its future business to Velocity, John provoked an argument that ended with John's terminating Cory's employment at Velocity. Vol I, pg. 55, lines 50-20. Cory begged John to allow him to keep his job as he had a family to support. Vol I, pg. 58, lines 3-24. When the boys' father learned of the termination, he called a family meeting the following morning, September 21, 2014, to see whether John and Cory could resolve their differences such that Cory could return to work at Velocity. Vol I, pg. 105, lines 7-20. Present at the meeting were Cory, John, their father Ronnie Newingham, their brother-in-law, Russell Ferguson, and Cory's wife, Amanda Newingham. Vol I,

pg. 57, lines 21-23. In front of the three witnesses, John confirmed that he would not rehire Cory to work at Velocity but that he would continue to honor their contract to pay commissions on all future work provided to Cory's customers. Vol I, pg. 119, lines 23-25. Commissions were paid for 2 additional months, but were terminated on November 2014. Plaintiff's Exhibit 7.

The Summons and complaint were served on John and Kristie's 15-year old daughter at 1002 Daffodil Avenue, Orting, WA 98360, which is John's and Kristie's residence and, at the time, was also the address for Velocity's registered agent, John Newingham.

Velocity filed an answer and counterclaims on April 9, 2015.

VI. ARGUMENT

1. Standard of Review

When reviewing objections to a trial court's findings of fact and conclusions of law, the appellate court engages in a two-step process. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the court reviews the record to determine whether the trial court's findings are supported by substantial evidence. *Id.* Second, the appellate court determines whether those findings that are supported by substantial evidence are sufficient to support the trial court's legal

conclusions. *Landmark*, 138 Wn.2d at 573. An appellate court reviews a trial court's legal conclusions *de novo*. *Scanlan v. Townsend*, 178 Wn. App. 609, 617, 315 P.3d 594, 597 (2013). Whether service of process was proper is a legal conclusion that the appellate court reviews *de novo*. *Streeter-Dybdahl*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010).

2. **In a breach of contract action, Cory named three defendants: Velocity CNC Machining, Inc., his brother John, and John's wife Kristie. It is undisputed that service under RCW 4.28.080(15) was sufficient to invoke the court's jurisdiction over John and Kristie when process was left at their residence with their 15-year-old daughter. Because John is Velocity's registered agent and John's home is the address for Velocity's registered agent, under the reasoning of *Hastings v. Grooter*, service was effective to invoke the court's jurisdiction over Velocity. Service under RCW 4.28.080(15) was also effective to invoke the court's jurisdiction over Velocity under *Reiner v. Pittsburg Des Moines Corp.*, 101 Wn.2d 475, 680 P.2d 55 (1984) because John and Kristie are Velocity's president and vice president respectively.**

Velocity assigns error to the trial court's denial of its Motion to Dismiss Velocity from the case for failure of service under RCW 4.28.080(9), which governs service of process on a corporation. Velocity argues, in essence, that courts must construe subsection (9) strictly to require hand-to-hand service on a corporate officer or registered agent. Respondent Cory asserts that under subsection (15) substitute service on

Velocity's officers and registered agent was sufficient to invoke the trial court's jurisdiction over Velocity.

To resolve this dispute, the court begins with Section 4.28.080 of the Revised Code of Washington, which provides for the commencement of actions in the State of Washington. RCW 4.28.080 reads, in pertinent part, as follows:

> RCW 4.28.080 **Summons, how served.**
>
> Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:
> . . .
>
> (9) If the suit be against a company or corporation . . . to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.
> . . .
>
> (15) In all other cases by leaving a copy of the summons at the house the defendant's usual abode with some person of suitable age and discretion then resident therein.

RCW § 4.28.080.

As noted above, RCW § 4.28.080(15) authorized service on a defendant personally (that is hand-to-hand service) or "substitute service" (that is by leaving a copy of the summons at the defendant's usual place of

abode with some person of suitable age and discretion then resident therein). *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155, 1159 (2014). John and Kristie received "substitute" service.

> A. Because RCW 4.28.080(9) provides that service on a corporation is sufficient if made on the corporation's registered agent and because RCW 23.95.450(1) does not indicate how to accomplish service on a registered agent, service on a registered agent is accomplished under RCW 4.28.080(15) which allows for substitute or "abode" service.

RCW 4.28.080(9) provides that service on a corporation may be made on, among other things, the corporation's registered agent. The Uniform Business Organizations Code also provides that jurisdiction is acquired over a corporation by serving the corporation's registered agent. RCW § 23.95.450(1). And RCW 23.95.450(6) provides that "[s]ervice of process . . . may be made by other means under law other than this chapter." RCW § 23.95.450(6). However, both RCW 4.28.080 and RCW 23.95.450 are silent as to the means by which to accomplish service over a registered agent. The question becomes a registered agent may be properly served by "abode" service under the catch-all provision of RCW 4.28.080(15).

Division III of the Court of Appeals answered this question when it decided *Hastings v. Grooters*, 144 Wash. App. 121, 124, 182 P.3d 447,

447 (2008). In *Hastings*, the buyer filed an action seeking a public sale of real property in lieu of foreclosure. RCW 61.30.120 required the buyer to file and serve such an action before the seller recorded its Declaration of Forfeiture. RCW 61.30.120 also required service to be made on the seller, or the seller's agent or attorney. Instead of serving any one of those three individuals, the buyer served the receptionist that worked for the same law firm where the seller's attorney worked. The trial court dismissed the action for public sale in lieu of foreclosure.

On appeal, the buyer argued that RCW 61.30.120 did not require personal service because that statute did not specifically state that personal service was required. *Hastings*, 144 Wash. App. at 126. The appellate court held that because the action required an order signed by a judge, the court rules applied. The court noted that CR 3 required civil actions to be commenced by service on a defendant of a copy of a summons and complaint. *Hastings*, 144 Wash. App. at 126. Under CR 3, the summons and complaint were to be served in accordance with CR 4; and, CR 4(d)(2) directed that personal service of a summons and complaint in a civil action to be made in accordance with RCW 4.28.080. The court of appeals went on to explain that because CR 4(d)(2) was silent as to the means by which to serve the summons and complaint on those individuals, service was to

be accomplished under the catch-all provision of RCW 4.28.080 (15). Respondent asks the court to apply Division III's reasoning when determining the outcome of this appeal. Just as Court Rules 3 and 4(d)(2) applied in *Hastings*, CR 3 and CR 4(d)(2), apply here. In the instant appeal, CR 4(d)(2) states that service can be made, among other things, under RCW 4.28.080 or RCW 23B.05.040. RCW 23B.05.040, in turn, "Service of process . . . on the corporation may be made in accordance with RCW 23.95.450"; and, RCW 23.95.450(1) states that "A represented entity may be served with any process . . . by serving its registered agent. Because neither RCW 4.23.080(9), nor RCW 23B.05.040, nor RCW 23.95.450(1) provides any instructions for the proper mode of service on a registered agent, the catch-all provision of subsection (15) of RCW 4.28.080 should be applied for service on Velocity's registered agent. In conclusion, RCW 4.28.080 provides that substitute service may be made on an entity by leaving a copy of the summons and complaint at a defendant's residence with a person of suitable age and discretion who is a resident therein, this court should hold that, under the reasoning of Hastings, substitute service on Velocity's registered agent was effective service on Velocity under RCW 4.28.080(9).

B. In the alternative, *Reiner v. Pittsburg Des Moines Corp.*, 101 Wn.2d 475, 476, 680 P.2d 55, 56 (1984), applies to validate substitute service on Velocity's president and vice president.

In the alternative, this Court should hold that substitute service on Velocity's president and vice president, under RCW 4.28.080(15), was effective to invoke the trial court's jurisdiction over Velocity.

Although Respondent has been unable to find any case directly on point, in an analogous case involving service on a foreign corporation, Washington's Supreme Court held that service on a foreign corporation was proper where process was left with the wife of the foreign corporation's "Manager of Site Support Services" at the manager's "usual place of abode." *Reiner v. Pittsburg Des Moines Corp.*, 101 Wn.2d 475, 476, 680 P.2d 55, 56 (1984). In *Reiner*, service was governed by RCW 4.28.080(10), which provided that, to commence an action "against a foreign corporation . . . to any agent, cashier or secretary thereof." *Reiner*, 101 Wn.2d at 476. The process server took a copy of the summons and complaint to the home of the corporation's "Manager of Site Support Services" and handed the copy to the Manager's wife. *Reiner*, 101 Wn.2d at 476. The foreign corporation argued on appeal that service on the wife of an agent for service of process at the agent's home was not adequate to

confer jurisdiction over the foreign corporation under RCW 4.28.080(10). On appeal, the court held that the service was adequate because the service was reasonably calculated to give the employee, as corporate agent, notice of the action. *Reiner v. Pittsburg Des Moines Corp.*, 101 Wash. 2d 475, 476, 680 P.2d 55, 56 (1984).[1]

C. There is No Merit to Appellant's Contention that Respondent Failed to File Confirmation of Service.

Appellant argues that the trial court erred in denying Velocity's motion to dismiss it from the case where Cory did not file a confirmation of service. This argument lacks merit because the designated clerk's papers it is clear that the confirmation of service was filed January 9, 2015, nearly a full month before the amended complaint was filed on February 24, 2015.

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The Supreme Court called *Reiner* into question when it decided *Nitardy v. Snohomish Cty.*, 105 Wash. 2d 133, 133, 712 P.2d 296, 296-97 (1986). In *Nitardy,* the plaintiff argued that substantial compliance with the service statute RCW 4.28.040 was sufficient under *Reiner v. Pittsburg Des Moines Corp.*, 101 Wn.2d 475, 680 P.2d 55 (1984). In *Reiner* the court held that substantial compliance with RCW 4.28.080(10) was sufficient where substitute service was made on a foreign corporation's employee by leaving a copy of the summons and complaint with the employee's wife at the employee's address because the employee's duties qualified him as the foreign corporations's agent for service of process. *Reiner*, 101 Wn.2d at ___. The Court held that substantial compliance was inapplicable where the controlling statute required service on the Snohomish County Auditor but where Nitardy served the Snohomish County Executive instead. *Nitardy v. Snohomish Cty.*, 105 Wn.2d at 134. In *dicta* the court "recognized" that its analysis may call *Reiner* into question, but noted that Nitardy did not raise the specific issue of whether service on the wife of an agent of a defendant foreign corporation would have been sufficient under RCW 4.28.080(10). *Nitardy*, 105 Wash. 2d at 135.

3. Judge Hogan did not err when she concluded that, because John and Kristie had not met their burden of establishing falsity they had not established their claim of defamation. Judge Hogan's Conclusion of Law No. 7 is an accurate statement of the law of defamation and the findings of fact support her conclusion. Moreover, Judge Hogan's Findings of Fact are supported by substantial evidence in the record.

Appellant challenges the following findings: Findings of Fact No. 38, 39, 42, 44, 48, 51 and 52. However, the Verbatim Report of Proceedings contains ample evidence to support each of those findings.

Findings of Fact No. 38 and No. 43 are very similar so they will be addressed together. Finding of Fact 38 states: "It is also undisputed that there was an affair. John was not married, but KayCee was married to Scott at the time of their affair." Finding of Fact 43 states: "John and KayCee had an affair. There was no other way to re-spin what is undisputed occurred. There was an affair. John never told his now wife Kristie."

On direct examination of KayCee Stackle, KayCee admitted that she had an affair with John when she was married to Scott Stackle.

Q. And did you have an affair with John Newingham?

A. Yes.

Q. Do you remember when that was?

A. Mid '03 to the beginning of '04.

Q. Okay, And was John living with you and Scott, you and your husband during that time?

A. Of . ..

Q. Of the affair?

A. No.

Q. So had he moved out of your house?

A. It was before he moved in.

RP Vol II, pg. 235, lines 15-25. On direct examination of KayCee's husband Scott, Scott testified that as of the date of the trial he and KayCee had been married for about 20 years. That testimony is set forth below:

Q: Mr. Stackle, are you the husband of KayCee Stackle?

A: Yes, I am.

Q: And how long have you been married to KayCee?

A: 20 Years

Verbatim Report of Proceedings of January 20, 2016, pg. 229.

John also admitted that he and KayCee had an affair while Scott and KayCee were married. The supporting evidence is set forth below:

Q. Did you ever live with Scott and KayCee?

A. For a short time, yes.

Q. Do you know approximately when that was?

A. End of 2003

Q. So you were residing with Scott and KayCee Stackle. Were they married?

A. Yes.

Q. But you were confident they were married when you were living with them in 2003?

A. Yes.

Q. How long, if you remember, did you reside with them?

A. Just a couple of months.

Q. And were there any sexual relations between you and KayCee Stackle during that time?

A. Yes.

Q. When you lived there?

A. Yes.

RP Vol. II, pg 184. There is no countervailing evidence in the record. Accordingly, Finding of Facts of Fact No. 38 and No. 43 are supported by substantial evidence in the record.

Finding of Fact No. 39 states: "It is also undisputed that others knew or suspected of the affair, including Amanda Newingham, Cory Newingham, and Scott Stackle." John's objection to Finding of Fact No.

39 is without merit because substantial evidence in the record supports Finding of Fact No. 39.

Q. Okay. And did you ever have any suspicions that she was having an affair?

A. I had some suspicions around that time, but I wasn't going to make accusations without any basis.

RP Vol. II, Examination of Scott Stackle, pg. 231, Lines 22-25.

On cross examination of Scott, John's attorney asked the following question:

Q. You indicated you had some suspicious that KayCee was having an affair. Were these suspicions in 2003, 2004 or when were they?

A. They were in '04, I believe.

Pg 232, Lines 17 - 20.

Findings of Fact No. 41 and No. 42 are actually legal conclusions. Finding of Fact No. 41 states: "The relationship of the affair to John and Kristie, whether they were living together, dating, not dating, not seeing each other, is of no legal consequence." Finding of Fact 42 states: "Whether the affair continued during the time John was living with Kristie or occurred only after John and Kristie resumed their relationship is of no legal consequence."

An appellate court is not bound by a trial court's designation of factual findings or legal conclusions; a finding of fact that is really a legal conclusion will be treated as a legal conclusion, subject to *de novo* review. *Local Union 1296, Int'l Ass'n of Firefighters v. City of Kennewick*, 86 Wn.2d 156, 161-62, 542 P.2d 1252 (1975).

The court of appeals need not review these to legal conclusions because John has not cited any authority to support his challenges to Finding of Fact No. 41 or 42. Nor has Respondent been able to find any legal authority concerning the definition of "affair." Black's Law Dictionary does not define "affair." However, Division II has stated that Courts are to give words their "'natural and obvious meaning." *Yeakey v. Hearst Commc'ns, Inc., 156 Wn. App. 787*, 791 234 P.3d 332 (2010)(*quoting Sims v. Kiro Inc.*, 20 Wn. App. 229, 234, 580 P.2d 642 (1978). The common meaning of affair does not make marriage a requirement. Merriam-Webster defines affair as a secret sexual relationship between two people." *See, www.merriam-webster.com/dictionary/affair*.

John also challenges Finding of Fact No. 44, which states: "There was no evidence of how Cory's disclosure of the affair defamed John and Kristie other than to reveal that which John had not told Kristie or others

about." This challenge lacks merit because the record is devoid of any direct, circumstantial, or testimonial evidence concerning damages caused by the alleged defamatory statement.

John challenges Findings of Fact No. 48 and No. 51. Findings of Fact No. 48 states: "It is undisputed that both John and Cory spoke, e-mailed, and sent text messages to each other that were hurtful and unnecessary concerning John's affair, Velocity's termination of Cory's general manager position, and over Velocity's failure to honor the commissions contract." Finding of Fact 51 states: As a result of Cory's revelation of the affair and defendants' breach of the commission contract as well as termination of Cory's employment as Velocity's general manager, the Newingham family is now at odds. Marriages and family relationships have been affected. Friendships have been lost. Attendance at family social events have been affected for everyone. Everyone is responsible for this dysfunction. Everyone is too proud, too stubborn, too polarized, too angry, and has said too many regretful things for the family to self-repair, even as Ronnie Newingham's health continues to deteriorate.

These two Findings of Fact arguably support the conclusion that John had failed to establish fault. On the other hand, Findings of Fact No. 48 and 51 apparently relate to the question of damages. In any event,

although there is substantial evidence in the record to support these two finding, the court of appeals need not address them because damages are irrelevant, John having failed to establish falsity.

In view of the foregoing supported factual findings, the court must determine whether those findings of fact support the trial court's conclusions of law. Conclusion of Law No. 7 is set forth below:

> Defendants counter claimed for defamation. A defamation plaintiff must establish four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). Defendants have failed to establish falsity because it is undisputed that John had an affair with KayCee Stackle who was married at that time to Scott Stackle. There is also a failure of proof on the element of damages.

Judge Hogan's Conclusion of Law No. 7 is a correct statement of the law of defamation. *See, Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). *Citing Mohr v. Grant*, Division II held that a private individual plaintiff alleging defamation must show falsity, unprivileged communication, fault, and damages. *Yeakey v. Hearst Commc'ns, Inc.*, 156 Wash. App. 787, 791-92, 234 P.3d 332, 335 (2010) (*citing, Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005)). Division II has also held that "[d]efamatory meaning may not be imputed to true statements" Id.

Whereas the supported findings of fact are sufficient to support

Judge Hogan's Conclusion that John and Kristie failed to meet their burden of proving defamation, the court of appeals should affirm the trial court's ruling concerning their defamation claim.

4. Judge Hogan did not err when she concluded that Defendants below had not met their burden of proving intentional infliction of emotional distress because the conduct did not rise to the level of outrageousness. The findings of fact supporting this conclusion are supported by substantial evidence in the record.

Finding of Fact 52 states: There is a failure of proof that Cory intended to inflict emotional distress on John or Kristie individually, and there is no such tort available for Velocity. This finding of fact is subject to two interpretations. Arguably the purpose of Cory's revelation of the affair was meant to prompt John into complying with the parties' service contract. However, in order to be entitled to prevail on its claim for defamation, John and Kristie had to establish that Cory's statement was false. Cory's statement was that John and KayCee had an affair. The evidence in the record supports a finding that Cory's statement was true. Because Cory's statement was true, it is unnecessary to discuss whether John or Kristie were damaged by revelation of the affair. In any event, the record is devoid of evidence concerning damages.

Because the challenged findings are supported by substantial

evidence in the record, the appellate courts only task is to determine whether the findings of fact support the trial court's conclusion of law.

Appellant contends that the trial court erred in concluding that John did not establish the tort of intentional infliction of emotional distress. Appellant challenges Conclusion of Law No. 9, which reads as follows:

> Defendants counterclaimed for Intentional Infliction of Emotional Distress. John and Cory exchanged words, e-mails, and text messages that were hurtful and unnecessary to each other over the termination of the commission contract and Cory's general manager position as well as over Cory's revelation of John and KayCee's affair. As a result, family relationships have been damaged and friendships have been lost. Everyone is responsible for this dysfunction. Everyone is too proud, too stubborn to polarized too angry, and has said too many regretful things for the family to self-repair, even as Ronnie Newingham's health continues to deteriorate. However, there is a failure of proof that Cory intended to inflict emotional distress on John or Kristie individually, and there is no such tort available for Velocity.

Conclusion of Law No. 9.

The tort of intentional infliction of emotional distress is also known as the tort of outrage." *Kloepfel v. Bokor*, 149 Wn.2d 192, 194-95, 66 P.3d 630 (2003). The elements of outrage are (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.

Reid v. Pierce County, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). Proof of the first element requires "behavior 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Reid*, 136 Wn.2d at 201-02. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are not compensable. *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

Judge Hogan's conclusion of law is actually a finding of fact, for the most part. However, the factual statements set forth in her legal conclusion do not rise to the level of outrageousness, which is element (1) of the tort of intentional infliction of emotional distress. No reasonable trier of fact could find that Cory's mistreatment of John or Kristie qualifies as behavior so extreme in degree as to go beyond all bounds of decency.

John also assigns error to findings 38-39, 41-44, 48, 51, and 52. The respondent has address each of those challenged findings above and has found each to be supported by substantial evidence in the record.

5. Judge Hogan did not err inn concluding that the parties' unilateral contract was not obtained under duress or coercion.

Appellants assign error is assigned to the trial court's findings 7, 8, 10, 12-13, 24, 28 and to the trial court's Conclusions of Law No. 1, 4, 5 & 6 s contract.

Respondent asserts that the trial court's findings of fact are supported by substantial evidence in the record and that the trial court's Conclusions of Law set forth accurately the law of contracts. The challenged findings of fact are set forth below and will be addressed *ad seriatum.*

Finding of Fact No. 7 States: At this time, through its president John, Velocity made an offer to Cory and others to pay commissions for obtaining new customers for Velocity. Only Cory accepted the offer.

Ample evidence supports Finding of Fact No. 7. Specifically, Cory testified that John offered to pay him a commission for obtaining new customer's for Velocity; and, Ronnie Newingham, John's and Cory's father, testified that John told him that Cory was the only person who accepted the offer. The pertinent testimonial evidence is set forth below:

Q. So, Cory, can you tell the Court how this offer for a contract came into existence.

A. Yeah. So in November, I'm not sure of the year, it would be 2011, I believe, or 2010, when I was working for Staffmark, my brother had invited me to his shop. I think it was the day after he had moved into his new shop.

And while I was there, he said, hey, we only have one customer. We're trying to build a business and we– if you can get us some customers, I'll give you 10 percent of every sale that goes through the shop that are your customers for as long as we do business with them. And I agreed.

RP, Vol. I, pg. 30, lines 24 & 25; and, pg. 31, lines 1-11.

Q. Mr. Newingham, you are the plaintiff's and defendants' father?

A. Yes.

Q. And were you aware that Cory and John had entered into a contract for John to pay Cory commissions?

A. Well, I don't know if they ever had a contract. But John said that he'd offered the 10 percent commission to a couple of people and Cory was the only one that took him up on it.

RP, Vol. I , pg 104, lines 13 through 21.

Finding of Fact No. 8 states: The offer included the following relevant terms: Cory would immediately begin to solicit new business for

Velocity; Cory would receive a ten percent commission on all invoices paid by each client who was brought to Velocity by Cory's solicitation; and, the commissions would be paid so long as Velocity did business with and performed services for customers that were brought to Velocity by Cory's efforts.

There is ample evidence in the record to support the above finding. Specifically, Cory testified as follows:

Q. And were those the only terms of the offer at that point in time?

A. Yeah, that was it. 10 percent of every sale for as long as he did business with the customer.

Q. And it was clear. Was there any termination date at that time?

A. Never.

Q. So were you going to get commissions on all the business or only on the invoices that were actually paid?

A. On all the business, whether they were paid or not, as long as my customer hired us to do the work and we performed and sent the work to the customer. He was taking responsibility as a business owner if something happened and someone didn't pay him.

RP, Vol. I, pg. 30, line 25, & Pg. 31, lines 1-25.

Q. And did you accept - -

A. I did.

Q - - John's offer? And how did you accept the offer?

A. By starting – I started sending e-mails and looking for customers.

RP, Vol. I, pg. 33 lines 7-11.

Q. So when did you start performing on the contract?

A. I landed my first customer, first sale, in April of that following year.

Q. But when did you start actually working on it?

A. Started right away.

RP, Vol. I, pg. 33, lines 19-23.

Finding of Fact No. 10 States: The testimony is undisputed that both parties anticipated and expected that this arrangement and agreement would be long-term. After all, they were brothers. Even though John was acting in his capacity as president of Velocity, both expected that they would make significant money if Cory was successful in bring in new clients. There is substantial evidence in the record to support Finding of Fact No. 10. Specifically, Cory testified as follows:

Q. Did he say anything about your commissions in lieu of being part of the company?

A. There was a conversation that him and I had on the way back from a casino, and I had mentioned that maybe some day I'd like to buy in, and he said, my wife and I aren't interested in letting anyone buy in. But you're not going to need to buy in because you'll be making so much money, we'll be sitting on top level overlooking our employees.

RP, Vol. I, pg. 54, lines 1-8.

Finding of Fact No. 12 States: It is also undisputed that once the offer was made and accepted, Cory immediately began to procure clients for Velocity, and this procurement continued for approximately one and three quarter years, i.e., from November 2012 until September 2014. Plaintiff's Exhibit No. 7. Finding of Fact No. 12 is supported by substantial evidence in the record. Specifically Finding of Fact No. 12 is supported by Cory's testimony on direct.

Q. So when did you start performing on the contract?

A. I landed my first customer, first sale, in April of that following year.

Q. But when did you start actually working on it?

A. I started right away.

RP, Vol. I, pg. 33 lines 19-23.

Q. Were you soliciting work for Velocity while you were working at Staffmark?

A. I was.

Q. So what did you do while you were working at Staffmark? I thing you told the Court that you - -

A. Yeah, I hired and fired employees.

Q. No. I mean to solicit customers.

A. Oh, to solicit customers for his business, I sent e-mails. When I was close to landing them, I would take them doughnuts, visit their shop, just everything that I thought a sales person would do. And I've dealt with sales people s a manager, and that's kind of what they would do for me when they were soliciting my business, so I just kind of did the same.

RP, Vol. I, pg. 38, Lines 5 through 18. Finding of Fact No. 13 States: It's also undisputed that Cory procured these clients under the terms of the parties' oral understanding and agreement, even though Cory was employed full time at Staffmark.

Q. So when did you start performing on the contract?

A. I landed my first customer, first sale, in April of that following year.

Q. But when did you start actually working on it?

A. I started right away.

RP, Vol. I, pg. 33 lines 19-23.

Q. Were you soliciting work for Velocity while you were working at Staffmark?

A. I was.

Q. So what did you do while you were working at Staffmark? I thing you told the Court that you - -

A. Yeah, I hired and fired employees.

Q. No. I mean to solicit customers.

A. Oh, to solicit customers for his business, I sent e-mails. When I was close to landing them, I would take them doughnuts, visit their shop, just everything that I thought a sales person would do. And I've dealt with sales people s a manager, and that's kind of what they would do for me when they were soliciting my business, so I just kind of did the same.

RP, Vol. I, pg. 38, Lines 5 through 18. Finding of Fact 24 States: According to John, the volume of anticipated work would bring large commission checks to Cory and significant business to Velocity. FF 24.

Q. Did he say anything about your commissions in lieu of being part of the company?

A. There was a conversation that him and I had on the way back from a casino, and I had mentioned that maybe some day I'd like to buy in, and he said, my wife and I aren't interested in letting anyone buy in. But you're not going to need to buy in because you'll be making so much money, we'll be sitting on top level overlooking our employees.

RP, Vol. I, pg. 54, lines 1 through 8.

Finding of Fact 24 States: Also at this meeting John confirmed and reaffirmed that he would continue to pay Cory commissions for an indefinite period of time as originally agreed. FF 28.

Russell Ferguson testified as follows:

Q. Okay at any time during this meeting, did you hear John say that he would continue to pay Cory his commissions?

A. Yes.

RP, Vol. I, pg. 119, lines 23-25 & pg. 120, Line 1.

A. I – at one point I did say that I would continue paying commissions to help him get on his feet.

Q. Did you say how long you would continue to pay commissions?

A. No.

RP, Vol. I, pg. 140, lines 10-14.

Appellants challenge the Conclusions of Law. The law that pertains to a breach of contract action is as follows. When determining whether a contract has been breached, a court must resolve two issues. *Foster v. Knutson*, 84 Wn.2d 538, 544 (1974). "First, a court must inquire as to whether there is any basis for refusing to enforce the contract made by the parties or whether a party has asserted valid affirmative defenses to the formation of the contract." *Id.* If the court finds no basis for refusing to enforce the contract, or if it finds that the defendant has no valid affirmative defense to the contract's formation, the court then examines the contract itself to determine its terms. *Id.* Only after completing these first two steps does the court decide whether the contract has been breached. *Foster*, 84 Wn. 2d at 544-45 (1974).

Conclusion of Law 1. Velocity, through its president John made an offer to Cory to pay commissions on all clients that Cory acquired for Velocity and who continued to do business with Velocity. Cory accepted the offer by performance. Consideration on Cory's part was his acquisition of new clients. On Velocity's part, consideration consisted of payment of the promised commissions. Velocity and Cory had a binding oral contract.

The trial court did not err in concluding that the parties had a binding oral contract. this was a unilateral contract. "A unilateral contract consists of a promise on the part of the offeror and performance of the requisite terms by the offeree." *Multicare Medical Ctr. V. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 583, 790 P.2d 124 (1990). Where one party to a contract has fully performed and all that remains for the other party to do is to pay. *Phelps v. Herro*, 137 A.2d 159, 163-64 (1957). Conclusion of Law 4. While John's post-termination offer to continue to pay commissions to Cory is asserted to have been made under duress, a new and different commission contract was never formed after Cory was terminated from Velocity.

Whereas the parties' contract was unilateral, it was enforceable when the plaintiff fully performed all that remained was for Velocity to pay for that performance. Conclusion of Law No. 4 correctly indicates that even if John felt coerced into agreeing to pay Cory commissions, because the contract was unilateral, John was legally obligated to pay for Cory's performance, which had been completed before Ronnie Newingham called the family meeting.

Conclusion of Law 5. Damages are awarded for breach of contract to protect a party's reasonable expectation. *Veritas Operating Corp. v.*

Microsoft Corp., 2008 U.S. Dist. LEXIS 112135, 11-13 (W.D. Wash. Feb. 26, 2008). "For cases in which profits are the inducement for entering into a contract, lost profits are the proper measure of damages for a breach of contract if they can be proven with reasonable certainty." *Ranchers Exploration & Dev. Corp. v. Miles*, 102 N.M. 387, 389 (1985). Plaintiff Cory Newingham had a reasonable expectation that he would receive a 10% commission *ad infinitum* for his role in building Velocity's business. Plaintiff is entitled to the average monthly commission for 36 months. The total lost profits is $49,924.08.

Conclusion of Law No. 5 is an accurate statement of the law. Appellant has failed to cite any contrary law, nor has appellant argued that Judge Hogan miscalculated the damages, much less has he produced any evidence that Judge Hogan miscalculated the damages.

Conclusion of Law 6. A court has the authority to award prejudgment interest if the amount due is liquidated, or the amount is based on a specific contract for the payment of money and "the amount due is determinable by computation with reference to a fixed standard." *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968). The amount due is liquidated. The interest rate is 12% per annum. Thus prejudgment interest totals $5,990.89. Conclusion of Law No. 6 is an

accurate statement of the law. Appellant has failed to cite any contrary law, nor has appellant argued that Judge Hogan miscalculated the damages, much less has he produced any evidence that Judge Hogan miscalculated the damages.

5. Attorney Fees Under RAP 18.1

The reviewing court may award attorney fees and costs on appeal if applicable law grants a party the right to recover reasonable attorney fees on review and the party devotes a section of its opening brief to the request for fees. RAP 18.1.

The respondent hereby requests attorney fees for defending this appeal in the event that respondent prevails. Under RCW 4.84.290 the prevailing party on appeal has a right to recover attorney fees. In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal.

Put another way, RCW 4.84.185 requires the non-prevailing party to pay the prevailing party the reasonable expenses including attorney fees and costs in opposing any counterclaim or third party claim if frivolous and advanced without reasonable cause. RCW 4.84.185.

Respondent contends that he is entitled to reimbursement of attorney fees and costs for responding to John's appeal of counterclaims for defamation, intentional infliction of emotional distress, and for allegations that the trial court erred when it held that the parties contract was not obtained as a consequence of duress and coercion. John had no reasonable basis to appeal Judge Hogan's findings and conclusions related to those assignments of three through five. It should have been apparent that there was ample evidence in the record to support the trial court's findings and that the trial court's conclusions of law were correct. In view of the considerable amount of time that Respondent's attorney expended responding to assignments of error three through five, the court should award her attorney fees and costs under RCW 4.84.185.

Another basis for an award of attorney fees on appeal is *Schmalenberg v. Tacoma News*, 87 Wash. App. 579, 589 n.23, 943 P.2d 350, 356 (1997)(*citing* RESTATEMENT (SECOND) OF TORTS at 197, 321-22 (economic damages)). In *Schmalenberg*, the court held that the plaintiff in a defamation action was entitled to an award of economic damages. *Id.* And, in 2005, the Washington Court of Appeals held that "where no matters of public concern are involved, presumed damages to a private plaintiff for defamation without proof of actual malice may be available."

Maison de France v. Mais Oui!, 126 Wn. App. 34, 54 108 P.3d 787 (2005). *See also Demopolis v. Peoples Nat. Bank of Washington*, 59 Wn.App. 105, 116, 796 P.2d 426 (1990).

John did not prevail on his defamation claim below; and, Cory did not ask for attorney fees because under Washington Law, Cory was not entitled to reimbursement of fees incurred in defending against a defamation claim. Cory is, however, entitled to attorney fees for responding to the appeal of the defamation claim pursuant to RAP 18.1.

If a plaintiff prevails in a action for intentional or reckless infliction of emotional distress, the plaintiff is entitled to damages. severe emotional distress. *Kloepfel v. Bokor*, 149 Wash. 2d 192, 195-96, 66 P.3d 630, 632 (2003) (and cases cited therein).

CONCLUSION

The trial court determined that service on Velocity conformed with RCW 4.28.080(9) when service was made on Velocity's registered agent at the registered agents address because substitute service under RCW 4.28.080(15) is effective service on a registered agent may. In the alternative service conformed with the requirements of RCW 4.28.080(9) when substitute service under RCW 4.28.080(15) because the summons

and complaint was left at Velocity's officers' residence with a person of suitable age and discretion that was a resident therein.

There is no merit to appellants' challenge to the various findings of fact and conclusions of law that support the trial court's determination that John and Kristie did not meet their burden of establishing defamation or intentional infliction of emotional distress. John and Kristie could not establish defamation because the alleged defamatory statements were true. Nor did they establish the tort of intentional infliction of emotional distress because Cory's conduct did not rise to the level of outrage.

Finally, there is no merit to appellants challenge to the trial court's findings and conclusion that Cory had not obtained Velocity's acceptance of the Sales Representative Agreement under duress or coercion. The Trial court found that Cory had completed his obligations under the contract before any alleged coercion or duress that took place when the parties met at a family meeting to discuss Velocity's obligation to comply with his obligations under the contract.

The trial court's judgment should be affirmed.

In addition, the respondent has requested attorney fees under RAP 18.1 on the grounds that respondent will be the prevailing party, on the grounds that John's and Kristie's appeal of the trial court's denial of their

counterclaims was frivolous, and on the grounds that they were entitled to reimbursement of fees and costs on appeal where they were required to respond to claims of defamation and intentional infliction of emotional distress, which tort claims allow for an award of damages incurred by a prevailing plaintiff.

DATED: October 18, 2016

Respectfully submitted by,

s/ Dorothy A. Bartholomew

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CERTIFICATE OF MAILING

I, Jada Wood, certify that on 18th day of October, I served upon Appellant a copy of Respondents's Brief upon all parties listed below at their address of record in the following manner:

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Dated this 18th Day of October, 2016, at Fife, Washington.

Jada Wood